FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 4 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 444

FLORENCE B. BIGELOW, et al.,
Petitioner-Plaintiffs,

vs.

RKO RADIO PICTURES, INC., et al.,
Respondent-Defendants.

REPLY BRIEF

for

RESPONDENT-DEFENDANTS

to

BRIEF OF AMICUS CURIAE

EDWARD F. MCCLENNEN
220 Devonshire Street
Boston 10, Mass.

MILES G. SEELEY
231 South La Salle Street
Chicago, Ill.

February 2, 1946

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 444

FLORENCE B. BIGELOW, et al.,
Petitioner-Plaintiffs,

vs.

RKO RADIO PICTURES, INC., et al.,
Respondent-Defendants.

REPLY BRIEF FOR RESPONDENT-DEFENDANTS

The Brief of Amicus Curiae describes the decision of the Circuit Court of Appeals as much more far reaching *in law* than is justified. The decision is wholly on the *facts* of this case and no departure from prior decisions or amplification of *the law* applied in them. The Brief Amicus Curiae advocates the rights of the plaintiffs on *the fact* assumed by the author and not on the evidence and not on the facts in their entirety which base the decision of the Circuit Court of Appeals.

The outstanding defect in the brief as amicus curiae, is that it assumes that the plaintiffs would have larger profits in an open market, unprotected by the price upkeeping system which enlarged the plaintiffs' box office receipts over what they would be without the protection of the system. This fact destroys all reasonable certainty that the plaintiffs, without the protection of the system, would have had even as large profits as they did have, or that the plaintiffs would have escaped a loss. The uncon-

frovertible facts are set out in the brief for the defendants, pp. 7-35.

Where it is shown that in fact a plaintiff has been injured, the decision of the Circuit Court of Appeals presents no obstacle to recovery. The decision coincides with the citations in the brief for the defendants, pp. 36-47.

The earnings in the base period, the four years before July 28, 1937, were made with the help of the price upkeeping system and supplemented by bank nights abandoned by the plaintiffs at the end of 1936. The indications are that those earnings were greatly increased by the sum of those two elements. With the cessation of bank night the competitive theatres had a heavy decline in receipts. There was complete uncertainty that any profits would have been made in the base period without bank nights and without the assistance of the price upkeeping system.

The Maryland comparison gave no help. It was clear that the verdict could not be and was not based on this. Also the Maryland made its earnings with the protection of this admission price upkeeping system and bank night and not in a free market, brief for defendants pp. 28-35, 23-26, 14-17. The Maryland's earnings slumped badly with the cessation of bank night at the end of 1936, brief for defendants pp. 21-22.

The system did not injure the plaintiffs by the adoption of double featuring, brief for defendants pp. 17-22.

A plaintiff, in fact injured by a conspiracy, is not prevented or retarded by the decision from showing the fact, brief for defendants pp. 36-47.

Respectfully submitted.

EDWARD F. McCLENNEN
MILES G. SEELEY
For the Respondent-Defendants

February 2, 1946